

FACT SHEET

OSHA's Vaccination and Testing ETS: How You Can Participate



The Occupational Safety and Health Administration (OSHA) has issued an emergency temporary standard (ETS) to protect unvaccinated employees of large employers (100 or more employees) from the risk of contracting COVID-19.

The ETS was published on November 5, 2021 and went into effect immediately. Employers must comply with most requirements within 30 days of publication and with certain testing requirements within 60 days of publication.

The ETS also serves as a proposed rule for a permanent standard. OSHA has initiated a 30-day public comment period and is inviting comments on any aspect of the ETS and how to proceed with the rulemaking. The public comments will allow OSHA to gather information, diverse perspectives and technical expertise to help the agency in considering next steps.

OSHA's COVID-19 Vaccination and Testing ETS requires covered employers to establish, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement, and enforce a policy allowing employees to elect to undergo regular COVID-19 testing and wear a face covering at work instead of vaccination.

The ETS also requires employers to determine employees' vaccination status and provide reasonable time, including up to 4 hours of paid time, for each employee primary vaccination shot and reasonable time and sick leave for any side effects.

Additionally, the ETS requires employers to remove employees with COVID-19 from the workplace until they meet return to work criteria, provide certain information to employees, and report work-related COVID-19 fatalities to OSHA within 8 hours and work-related in-patient hospitalizations to OSHA within 24 hours.

What opportunities are there for participation?

OSHA encourages members of the public to review and submit comments on the ETS during the public comment period. The specific topics on which OSHA is seeking additional information are described in greater detail below, but commenters may submit information on any topics related to this rulemaking.

The full text of the ETS is available at www.osha.gov/coronavirus/ets2 and at www.regulations.gov.

What is the deadline for submitting comments?

Written comments on any aspect of the ETS and how to proceed with the rulemaking must be submitted by January 19, 2022.

How will my participation impact the proposed rulemaking?

At the conclusion of the comment period, OSHA will review and analyze all of the comments and other materials in the public rulemaking record to determine how it should proceed with this rulemaking. The agency makes its decisions based on the evidence in the rulemaking record considered as a whole.

How can I submit materials or review the materials submitted to OSHA?

You may submit comments and attachments, identified by Docket No. OSHA-2021-0007, electronically at www.regulations.gov. Follow the instructions online for making electronic submissions.

All submissions must include the agency's name and the docket number for the ETS (Docket No. OSHA-2021-0007). When submitting comments or recommendations, commenters should explain their rationale and, if possible, provide supporting data and information. Wherever possible, commenters should indicate the title of the person providing the comments and, when appropriate, include information about the type and number of employees at their worksites.

All comments, including any personal information you provide, will be placed in the public docket without change and, with the exception of copyrighted materials, will be publicly available online at www.regulations.gov. Therefore, OSHA cautions commenters about submitting information they do not want to be made available to the public or submitting materials that contain personal information (either about themselves or others) such as Social Security Numbers and birthdates.

All comments and submissions are listed in the www.regulations.gov index; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Contact the OSHA Docket Office at 202-693-2350 (TTY number: 877-889-5627) for assistance in locating docket submissions.

What topics is OSHA seeking information on?

OSHA seeks comments on all aspects of the ETS and how it would be adopted as a final standard. OSHA encourages commenters to explain *why* they prefer or disfavor particular policy choices, and include any relevant studies, experiences, anecdotes or other information that may help support the comment. In particular, OSHA seeks comments on the following topics:

1. Employers with fewer than 100 employees. As discussed in the *Summary and Explanation for Scope and Application* (Section VI.B. of this preamble), OSHA has implemented a 100-employee threshold for the requirements of this standard to focus the ETS on companies that OSHA is confident will have sufficient administrative systems in place to comply quickly with

the ETS. The agency is moving in a stepwise fashion on the short timeline necessitated by the danger presented by COVID-19 while soliciting stakeholder comment and additional information to determine whether to adjust the scope of the ETS to address smaller employers in the future.

OSHA seeks information about the ability of employers with fewer than 100 employees to implement COVID-19 vaccination and/or testing programs. Have you instituted vaccination mandates (with or without alternatives), or requirements for regular COVID-19 testing or face covering use? What have been the benefits of your approach? What challenges have you had or could you foresee in implementing such programs? Is there anything specific to your industry, or the size of your business, that poses particular obstacles in implementing the requirements in this standard? How much time would it take, what types of costs would you incur, and how much would it cost for you to implement such requirements?

2. Significant Risk. If OSHA were to finalize a rule based on this ETS, it would be a standard adopted under 6(b) of the OSH Act, which requires a finding of significant risk from exposure to COVID-19. As discussed more fully in *Pertinent Legal Authority* (Section II. of this preamble), this is a lower showing of risk than grave danger, the finding required to issue a 6(c) emergency temporary standard. How should the scope of the rule change to address the significant risk posed by COVID-19 in the workplace? Should portions of the rule, such as face coverings, apply to fully vaccinated persons?

3. Prior COVID-19 infections. OSHA determined that workers who have been infected with COVID-19 but have not been fully vaccinated still face a grave danger from workplace exposure to SARS-CoV-2. This is an area of ongoing scientific inquiry. Given scientific uncertainty and limitations in testing for infection and immunity, OSHA is concerned that it would be infeasible for employers to operationalize a standard that would permit or require an exception from vaccination or testing and face covering based on prior infection with COVID-19. Is there additional scientific information on this topic that OSHA should consider as it determines whether to proceed with a permanent rule?

In particular, what scientific criteria can be used to determine whether a given employee is sufficiently protected against reinfection? Are there any temporal limits associated with this criteria to account for potential reductions in immunity over time? Do you require employees to provide verification of infection with COVID-19? If so, what kinds of verification do you accept (i.e., PCR testing, antigen testing, etc.)? What challenges have you experienced, if any, in operationalizing such an exception?

4. Experience with COVID-19 vaccination policies.

Should OSHA impose a strict vaccination mandate (i.e., all employers required to implement mandatory vaccination policies as defined in this ETS) with no alternative compliance option? OSHA seeks information on COVID-19 vaccination policies that employers have implemented to protect workers. If you have implemented a COVID-19 vaccination policy:

(a) When did you implement it, and what does your policy require? Was vaccination mandatory or voluntary under the policy? Do you offer vaccinations on site? What costs associated with vaccination did you cover under the policy? What percentage of your workforce was vaccinated as a result? Do you offer paid leave for receiving a vaccination? If vaccination is mandatory, have employees been resistant and if so what steps were required to enforce the policy?

(b) How did you verify that employees were vaccinated? Are there other reliable means of vaccination verification not addressed by the ETS that should be included? Did you allow attestation where the employee could not find other proof, and if so, have you experienced any difficulties with this approach? Have you experienced any issues with falsified records of vaccination, and if so, how did you deal with them?

(c) Have you experienced a decrease in infection rates or outbreaks after implementing this policy?

(d) If you have received any requests for reasonable accommodation from vaccination, what strategies did you implement to address the

accommodation and ensure worker safety (e.g., telework, working in isolation, regular testing and the use of face coverings)?

5. COVID-19 testing and removal. OSHA seeks information on COVID-19 testing and removal practices implemented to protect workers.

(a) Do you have a testing and removal policy in your workplace and, if so, what does it require? How often do you require testing and what types of testing do you use (e.g., at-home tests, tests performed at laboratories, tests performed at your worksites)? What costs have you incurred as part of your testing and removal policies? Do you have difficulty in finding adequate availability of tests? How often? Have you experienced any issues with falsified test results, and if so, how did you deal with them? Have you experienced other difficulties in implementing a testing and removal scheme, including the length of time to obtain COVID-19 test results? Do you offer paid leave for testing?

(b) How often have you detected and removed COVID-19 positive employees from the workplace under this policy? Do you provide paid leave and job protection to employees you remove for this reason?

(c) Should OSHA require testing more often than on a weekly basis?

6. Face coverings. As discussed in the *Summary and Explanation* for Face Coverings (Section VI.I. of this preamble), ASTM released a specification standard on February 15, 2021, to establish a national standard baseline for barrier face coverings (ASTM F3502-21).

Should OSHA require the use of face coverings meeting the ASTM F3502-21 standard instead of the face coverings specified by the ETS? If so, should OSHA also require that such face coverings meet the NIOSH Workplace Performance or Workplace Performance Plus criteria (see CDC, September 23, 2021)¹? Are there particular workplace settings in which face coverings meeting one standard should be favored over another? Are there alternative criteria OSHA should consider for face coverings

¹ Centers for Disease Control and Prevention (CDC). (2021, September 23). Types of Masks and Respirators. www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/types-of-masks.html. (CDC, September 23, 2021)

instead of the F3502-21 standard or NIOSH Workplace Performance or Workplace Performance Plus criteria? Is there sufficient capacity to supply face coverings meeting F3502-01 and/or NIOSH Workplace Performance or Workplace Performance Plus criteria to all employees covered by the ETS? What costs have you incurred as part of supplying employees with face coverings meeting the appropriate criteria?

7. Other controls. This ETS requires employees to either be fully vaccinated against COVID-19 or be tested weekly and wear face coverings, based on the type of policy their employer adopts. It stops short of requiring the full suite of workplace controls against SARS-CoV-2 transmission recommended by OSHA and the CDC, including distancing, barriers, ventilation, and sanitation. As OSHA explained in *Need for the ETS* (Section III.B. of this preamble), OSHA has determined that it needs more information before imposing these requirements on the entire scope of industries and employers covered by the standard. OSHA is interested in hearing from employers about their experience in implementing a full suite of workplace controls against COVID-19.

What measures have you taken to protect employees against COVID-19 in your workplace? Are there controls that you attempted to employ but

found ineffective or infeasible? What are they? Why did you conclude that they were they ineffective or infeasible; for example, are there particular aspects of your workplace or industry that make certain controls infeasible? Do you require both fully vaccinated and unvaccinated employees to comply with these controls? Have you experienced a reduction in infection rates or outbreaks since implementing these controls?

8. Educational materials. Have you implemented any policies or provided any information that has been helpful in encouraging an employee to be vaccinated?

9. Feasibility and health impacts. Do you have any experience or data that would inform OSHA's estimates in its economic feasibility analysis or any of the assumptions or estimates used in OSHA's identification of the number of hospitalizations prevented and lives saved from its health impacts analysis (see OSHA, October 2021c)²?

To find the preamble sections referenced in the questions, the ETS is available at www.osha.gov/coronavirus/ets2. To find the supporting materials referenced in the questions, search for the citations in Docket No. OSHA-2021-0007 on www.regulations.gov.

This Fact Sheet is intended to provide information about the COVID-19 Emergency Temporary Standard. The Occupational Safety and Health Act requires employers to comply with safety and health standards promulgated by OSHA or by a state with an OSHA-approved state plan. However, this Fact Sheet is not itself a standard or regulation, and it creates no new legal obligations.

² Occupational Safety and Health Administration (OSHA). (2021c, October). Health Impacts of the COVID-19 Vaccination and Testing ETS. (OSHA, October 2021c)